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Date: APRIL 22, 1994

Case No: 93-MSA-4

In the Matter of

CONSOLIDATION COAL COMPANY,
LOVERIDGE NO. 22 MINE,
Petitioner

Petition for Modification

Appearances:

David J. Hardy, Esq.
For the Petitioner

Edward H. Fitch, Esq.
For the Respondent

Before: THOMAS M. BURKE
Administrative Law Judge

DECISION AND ORDER GRANTING PETITION
FOR MODIFICATION

This is a proceeding under section 101(c) of the Federal Mine Safety and Health Act of 1977, (hereinafter "Mine Act") for modification of the application of the mandatory safety standards of 30 C.F.R. §75.364(b)(2) as pertains to the Consolidation Coal Company's Loveridge No. 22 Mine, in Monongalia County, West Virginia.

PROCEDURAL HISTORY

This proceeding commenced on July 31, 1992 with the filing by Consolidation Coal Company ("Consol") of a petition for modification with the Administrator of Coal Mine Safety and Health Administration ("MSHA") pursuant to §101(c) of the Act and 30 C.F.R. §§44.10 and 44.11. The petition requested modification of the application of 30 C.F.R. §75.364(b)(2)¹ in the Harvey Run area of the Loveridge No. 22 Mine. The petition alleged that compliance with the provisions of §75.364(b)(2) would result in a

¹Consol's petition referenced 30 C.F.R. §75.305. However, the regulations at 30 C.F.R. Part 75 dealing with ventilation were amended and revised, effective August 16, 1992, thirty days after the petition was filed. See 57 Fed. Reg. 20868 (May 15, 1992). At that time, the old §75.305 became the new §75.364(b). The Administrator treated the petition as a request to modify §75.364(b).

diminution of safety to miners, whereas the proposed alternate method described therein would at all times afford at least the same measure of protection to all miners as would be provided by §75.364(b)(2).

Section 75.364(b)(2) requires that a certified person make a weekly examination for hazardous conditions in each air course in its entirety. Consol contends in its petition that the application of §75.364(b)(2) in the Harvey Run area of the mine would expose mine examiners and miners to many hazards resulting from the deteriorating conditions of the return including numerous major roof falls, other blockages, and impassible conditions of entries. Consol proposes as an alternative method of examining for hazardous conditions a requirement of weekly air and methane checks at four designated checkpoints in the Harvey Run section and the immediate investigation of changes in readings that exceed the last reading by 10%.

MSHA initiated an investigation into the merits of the petition as required by §101(c) and 30 C.F.R. §44.13(a). The investigation was conducted by Thomas C. Hlavsa, MSHA Mining Engineer and ventilation specialist, and Frank Bowers, MSHA Coal Mine Inspector. They inspected the Harvey Run area of the mine on August 31, 1992, accompanied by Donald Glover, Safety Supervisor for Consol, and Charlie Melton, identified in the investigation report as "representative of miners."

Subsequently, Hlavsa and Bowers prepared a report responding to Consol's petition in light of their investigation. Ronald L. Keaton, MSHA District Manager and Edwin P. Brady, Chief of Engineering Services for MSHA's Coal District 3, concurred in the findings of the report. The report agreed with Consol that compliance with the regulation would result in a diminution of safety to miners, and found that the alternative method proposed by Consol would provide at least the same measure of safety as the regulation if revised to include seven "stipulations," one of which required that tests for methane, oxygen deficiency, and the quantity of air be determined weekly by a certified person at each monitoring station.

On April 6, 1993 a Proposed Decision and Order was issued by Robert A. Elam, Deputy Administrator for Coal Mine Safety and Health. The Proposed Decision and Order found that application of §75.364(b)(2) at the Harvey Run area would result in a diminution of safety, and ordered that the petition for modification be granted, conditioned upon compliance with some nine terms. The Proposed Decision and Order differed from Consol's petition in that it increased the frequency of monitoring the check points from weekly to daily.

Consol appealed the Proposed Decision and Order on April 23, 1993, contesting only that provision which requires daily rather than weekly evaluations of air quality and quantity at the monitoring stations. A hearing on the appeal was conducted in Morgantown, West Virginia, on November 4, 1993. Post-hearing briefs were submitted by Consol and the Administrator on February 14, 1994 and March 7, 1994, respectively, and a reply brief was received from Consol on March 11, 1994.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I

Consol owns and operates a coal mine in Monongalia County, West Virginia known as the Loveridge No. 22 Mine. The mine was opened in 1956. It operates three shifts a minimum of five days a week, and employs approximately 390 miners. The mine has two portals, the Sugar Run portal, which is the main portal, and the Miracle Run portal. It is ventilated by five air shafts: Sugar Run, Harvey Run bleeder shaft, Harvey Run, Miracle Run and St. Leo.

The subject of the petition for modification are the two Harvey Run return air courses that ventilate air into the Harvey Run air shaft. The area was developed and mined in the late 1960's. It is inactive and is not near any active areas. Many of the entries which make up these air courses have been inaccessible since 1985 or 1986 because of roof falls, cave-ins and a general deterioration of the roof and pillars. Nevertheless, the Harvey Run area entries have served as air courses since they were developed and thus are governed by §75.364(b)(2).²

Section 75.364(b)(2) applied literally at the Harvey Run return air courses requires that a certified miner walk the return air courses in their entirety once a week. Because of the dangers to miners attempting to traverse the area, check points were established in the mid 1980s to monitor the ventilation. The check points were monitored once a week.³

In April, 1992, Frank Bowers, an MSHA inspector, and Daniel Kuhn, the acting safety supervisor of the Loveridge No. 22 Mine, walked the Harvey Run returns in an attempt to map out a safe route that could be walked by a miner. Kuhn testified that they did some "zig-zagging," but ran into water making further passage impractical. They then established checkpoints to take air,

²N.T. pp. 75, 76.

³N.T. p.44.

oxygen and methane readings, and recorded them on the map. ⁴

Because the Harvey Run air courses could not be walked, MSHA issued a citation for violation of §75.364(b)(2). Consequently, Consol petitioned for the modification of application of §75.364(b)(2) at Harvey Run, which is the subject of these proceedings. The modification requests that Consol be permitted to monitor the check points rather than exposing miners to the hazards of travel through the returns.

Consol's petition for modification alleges that complying with §75.364(b)(2) at the Harvey Run area would diminish safety at the mine. The petition describes the area as containing numerous major roof falls, other blockages and impassible conditions of entries, and asserted that a large amount of timbers, great expenditures of materials and man hours would be required to bring the roof support into compliance with current mandatory standards, and that installation of such timbers would require miners to carry timbers for long distances, thus unnecessarily subjecting those miners to strains, sprains and other injuries.

The petition reasons that as a result of such falls and other hazards, weekly examinations of the specified air courses would jeopardize the safety and well-being of persons traveling the area by subjecting the persons to extremely hazardous conditions and great danger, and that attempts to rehabilitate this area would require exorbitant expenditures of man hours and money.

30 C.F.R. §44.14 requires MSHA to initiate an investigation into the merits of the modification petition. The investigation was conducted by Bowers and Thomas C. Hlavsa, MSHA Mining Engineer and ventilation specialist. They inspected the Harvey Run area of the mine on August 31, 1992, accompanied by Donald Glover, Safety Supervisor for Consol, and Charlie Melton, identified in the investigation report as a "representative of miners." The investigation culminated in a report by Hlavsa and Bowers. Its findings were concurred in by Ronald L. Keaton, MSHA District Manager and Edwin P. Brady, Chief of Engineering Services for MSHA's District 3 Office. The report agreed with Consol that compliance with §75.364(b)(2) at Harvey Run would result in a diminution of safety to miners, and found that the alternative method proposed by Consol would provide at least the same measure of safety as the regulation if revised to include

seven "stipulations," one of which required that tests for methane, oxygen deficiency, and the quantity of air be monitored

⁴N.T. pp. 154-156.

weekly by a certified person at each check point.

The Administrator issued its response to Consol's Petition for Modification on April 6, 1993. In a Proposed Decision and Order, the Administrator approved the use of monitoring stations as a modification of §75.364(b)(2) in accordance with Consol's plan. The Administrator, however, added several requirements, one of which mandates that Consol examine the approved check points on a daily basis, rather than on a weekly basis, as requested by the petition.

Consol disagrees with the requirement that examinations be conducted daily and prays that the alternative method set forth in its Petition be granted. Consol contends that it has met the burden imposed by §101(c) of the Act and 30 C.F.R. §44.4(a) by proposing an alternate method which will at all times guarantee no less than the same measure of protection to miners as would be afforded by the mandatory standard.

II

Petitions for modifications are governed by §101(c) of the Act. Section 101(c) provides in pertinent part:

Upon petition by the operator or the representative of miners, the Secretary may modify the application of any mandatory safety standard to a coal or other mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine....

30 C.F.R. §44.4 is the regulation implementing §101(c). It provides:

(a) A petition for modification of application of a mandatory safety standard may be granted upon a determination that--

(1) An alternative method of achieving the result of the standard exists that

will at all times guarantee no less than the same protection afforded by the standard, or

(2) Application of the standard will result in a diminution of safety to the miners.

Consol, as a party seeking a modification of a mandatory safety standard, has the burden of proof by a preponderance of the evidence. 30 C.F.R. §44.30. Consol must show that its proposed weekly examinations of the aircourse monitoring stations would achieve the same level of protection afforded the miners as the mandatory safety standard of §75.364(b)(2), that is, a weekly examination of the entire aircourses by walking.

In International Union, United Mine Workers of America v. FMSHA, 920 F.2d 960, (D.C.Cir. 1990) ("Emerald II") the court approved the Assistant Secretary's two step analysis for determining if a petition for modification satisfies the requirements of §101(c) and §44.4. The first step, aimed at meeting §101(c)'s requirement that the alternative achieve the result of the original standard, involves a determination of whether the modification promotes the specific safety goals of the original standard with roughly comparable success. The second step, aimed at meeting §101(c)'s requirement that the alternative guarantee the same measure of protection as the original standard, involves a determination of whether the modification achieves a net gain in mine safety (or at least equivalence), taking all effects into account. Id. at 963.

The first step of the court's analysis in Emerald II is clearly met by Consol's alternate plan. The system of monitoring checkpoints for ventilation promotes the same safety goal as requiring a certified miner to travel and examine entries of the intake and return air courses in their entirety. Both are intended to promote good ventilation, measure the volume of air and rate of methane, as well as identify hazardous conditions that could effect ventilation. Moreover, the monitoring checkpoints alternative has the advantage of not subjecting the miner to the hazards presented by traveling through the deteriorating Harvey Run returns.

At issue is the second step of the analysis. Consol contends that the Administrator's decision to reject Consol's alternate plan and require daily examination of the checkpoints is arbitrary and capricious because Consol had demonstrated that its alternate plan achieves mine safety at least equivalent to the regulatory standard.

Consol presented testimony from the general superintendent of the mine and the foreman of the Harvey Run area to show the

effect of weekly monitoring on overall mine safety.

Robert Omeare has been the general superintendent of the Loveridge No. 22 Mine since 1982. His duties include being the chief health and safety officer. He is responsible for the health and safety of all the employees at the mine. He testified that the weekly monitoring of the check points at the Harvey Run area is as safe, if not safer, than weekly walking the air courses in their entirety. He opined that daily monitoring does not add anything to the safety of the Loveridge No. 22 Mine in the Harvey Run area and, in fact, likely has a negative effect on safety because it removes the examining miner from other jobs that are more important to health and safety.

Omeare tenaciously considers weekly monitoring to be unnecessary. He testified that it can take four to five hours depending on traffic for a miner to visit all four checkpoints in the Harvey Run area, and its effect is an unnecessary diversion of the time of persons who typically are certified miners responsible for the safety of workers. "And him being taken away from his employees that he is in charge of, and them working without supervision, to me is a problem...To me, that diminishes safety when you are taking qualified people whose job it is to look after the health and safety of the employees, and send them up there to do something that is unnecessary."⁵

Omeare was asked on cross-examination about the reasonableness of employing additional people to monitor the checkpoints. Omeare replied: "... you hire three more people and put them up there to do work that is unnecessary. If I could hire three more people, I have a whole lot of things that I would rather be doing with them that is more important to the health and safety to miners, a whole lot of things."⁶

The thrust of Omeare's testimony is that the daily monitoring of checkpoints is redundant to other instrumentation in the mine that is intended to guard against or detect conditions that could effect ventilation, such as water accumulation, crushed out stoppings, and rock fall.

Water accumulation in an entry could effect ventilation by cutting off air flow. Omeare testified that there is little or no potential for that occurring at Harvey Run. He explained that unusual water accumulation, which would typically be caused by a broken line, would be detected by a pump located at a sump at Harvey Run, since the pump would operate for a longer than normal period of time if water started to accumulate. The pump is

⁵N.T. p.42.

⁶N.T. p. 83.

checked daily and the mine foreman is notified if the pump runs more hours than usual. He also testified that the haulage road is at a lower grade than the Harvey Run area, and thus water would flow toward the haulage road and be noticed before it rose to a significant level.

Stoppings are walls constructed out of six inch concrete blocks. Pressure may cause them to become crushed or fragmented at either their top or bottom. A crushed out stopping could effect ventilation by changing direction of air flow or causing the fans to attempt to pull a greater volume of air. Omeear testified that the effect of a crushed out stopping would be discernible by a significantly lower water gauge reading at the Harvey Run fan, which is checked daily, or by the fire boss as his duties include checking for change of air direction every eight hours. Omeear also testified that a crushed out stopping would not cause a dangerous situation whether there is daily or weekly monitoring of checkpoints. He explained that the condition would be recognized within twenty four hours of occurrence by the fan monitor or within eight hours by the fireboss. It would be corrected by construction of a temporary stopping initially and later a permanent one.⁷

Omeear opined that a rock fall that blocked an entry in the Harvey Run area could not significantly effect ventilation because the air course returns are made up of five entries. A blockage of one entry still allows sufficient ventilation through the other four entries. Omeear was asked if a rock fall in a return would impede safety from a ventilation standpoint. Omeear answered no, and explained:

It would not interrupt ventilation. It would not block any escape route. It would not do nothing. It is just a fall. If you walked it every week and you saw places fall in, there would not be anything you could do about it anyway, but find another way around.⁸

Kurt Helms is the mine foreman at the Harvey Run area. He testified that his first duty as a mine foreman is safeguarding the health and safety of the miners. He is also the chief ventilation officer of the mine. Helms' testimony explains the conditions unique to the Harvey Run area which allows weekly monitoring checks to afford the same level of protection as traveling the entire air course weekly. He observed that some areas of the mine may require daily checkpoint monitoring, but

⁷N.T. pp. 39, 40.

⁸N.T. p. 44.

that the conditions requiring same do not exist at Harvey Run.⁹

Helms testified that the checkpoints monitor for percent of methane, oxygen and volume of air. He explained that methane is released during the extraction of coal but that the air received at the Harvey Run checkpoints is characterized as "practically fresh air," because the air does not flow through or over a coal extraction process or active gob area.¹⁰ He testified that the only potential for release of methane at Harvey Run is the flow of the air over the seals, as methane can accumulate in the abandoned areas behind the seals.¹¹ However, He does not believe that the potential for release of methane at the seals necessitates daily monitoring at the check point. Each seal is checked by a miner every seven days to ensure its integrity, and, at the same time, the air at the seal is tested to determine the percentage of methane, and volume of air flow.¹² Also, because it is assumed that the seals will leak some methane, they are continuously ventilated by the Harvey Run fan. Methane and oxygen readings are taken at the Harvey Run fan daily. Significant levels of methane will be detected by the readings at the fan. Helms testified that roof falls could release methane but that the normal air flow is sufficient to dilute any methane released from a roof fall.¹³

Helms also corroborated Omeary's testimony that water accumulations, crushed out stoppings and roof falls in the Harvey Run area would not effect ventilation. He explained that water accumulation or roof falls would be unlikely to restrict air flow. Water will not fill an entry to the roof where, as here, the grade falls away from the entry, and, since the air courses are made up of five entries, a roof fall totally obstructing one entry would have no effect on air flow through the other four. Moreover, Helms testified, conditions such as roof falls which restrict air flow, and conditions such as crushed-out stoppings which increase air flow, would be detected by the daily water pressure gauge readings at the Harvey Run fan.¹⁴

In sum, Helms testified that the conditions of the Harvey Run area ensure that weekly monitoring of check points will

⁹N.T. p. 142.

¹⁰N.T. p. 97.

¹¹N.T. pp. 125, 128, 149.

¹²N.T. p.136, 140-142.

¹³N.T. p. 148.

¹⁴N.T. pp. 119-122.

provide a measure of safety equivalent to traveling of the entire air courses every seven days. The conditions he referenced include no active extraction of coal, no active gob area, five entry air course system, seals that leak no or minimal methane, weekly monitoring of the integrity and methane release of seals, and daily measurement of the air ventilating the Harvey Run area for methane, oxygen and volume of air.

Frank Bowers is an MSHA coal mine inspector. He was called on rebuttal as an adverse witness by Consol. He testified that he recommended weekly monitoring checks be approved as providing a level of safety equivalent to the weekly travel of the air courses in their entirety, and that he still agrees with his recommendation. Bowers agreed that daily checks are better than weekly. He also pointedly suggested that hourly would be better than daily and continuous monitoring is better than daily.¹⁵

It is determined that Consol has established a prima facie case. The testimony by Omeare and Helms is sufficient to support Consol's contention that its alternate plan, including weekly monitoring of check points, will provide a measure of safety equivalent to traveling the entire air courses every seven days as provided by §75.364(b)(2). Consol's evidence compels a finding that its petition for modification should be granted unless MSHA produces evidence to rebut.

Both parties argued the ramifications of the administrative law judge decision in Tunnelton Mining Company v Mine Safety & Health Administration, Case No. 89-MSA-1 (ALJ Morin, February 12, 1991), the only adjudication to discuss modification of §75.364(b)(2). Judge Morin held that the petitioner had not met its burden of showing that weekly examinations of the monitoring stations were equivalent to the weekly examinations described in the regulation. Consol argues that Judge Morin's decision should not be considered persuasive here because the hazardous conditions Judge Morin referred to as potentially effecting ventilation in the Tunnelton mine either do not exist in the Harvey Run area or are adequately monitored. Consol emphasizes that Judge Morin's decision was based on his finding that the effects on ventilation of certain hazards in the non-working areas, that is, crushed out stoppings, excessive water accumulations, roof deteriorations and rock falls, could not be discovered on a weekly inspection of monitoring stations as easily as on a walking inspection of the entire area.

As previously discussed, Omeare and Helms testified that the potential of these conditions to effect ventilation is nil, and there is adequate monitoring to detect a problem with ventilation

¹⁵N.T. p. 244.

at Harvet Run without the additional daily inspections. Moreover, in Tunnelton the MSHA inspector who investigated Tunnelton in response to its petition recommended daily inspections and testified to why such protection was necessary. Here, the inspector who investigated Consol's petition recommended weekly monitoring as being equivalent to the requirements of §75.364(b)(2).

III

In response to Consol's case, MSHA offers the testimony of Edwin Brady, the second in command at Coal District 3 which includes Loveridge No. 22 Mine, and Monty Christo, staff engineer with the Division of Safety in MSHA headquarters at Arlington, Virginia. Neither took issue with or contradicted the testimony of Consol's witnesses.

Edwin Brady is the Chief of Engineering Services in Coal District 3. His primary responsibility is the management of engineering services. He also serves at times as acting district manager. Brady concurred with the recommendations of the MSHA coal mine inspectors that Consol's request for an alternate plan including weekly monitoring of checkpoints should be approved. Brady testified that at the time he signed the report he had a good faith belief that a weekly examination was adequate, but that he has since changed his opinion based on a clearer understanding of the Division of Safety's interpretation of the requirements of the Mine Act.

Brady testified that if the petition was before him presently, he would require daily monitoring of the check points. His rationale appears to be that a coal mine by its nature is a dangerous place and therefore daily examinations are always preferable to weekly examinations. Brady testified:

A coal mine certainly is a dynamic entity. It changes. And even though you get consistency in readings, it always has the potential of changing on you. Any major disaster that you go into and any report that you want to read is a series of changing events that nobody logically thought would happen in that sequence. And that is the purpose of examinations.

We are looking at a regulation that requires weekly examinations to be physically present in order to look for things that can happen.

...

Examinations are as critical as anything a mine operator can do. And when we begin looking at a regulation that requires an examination and presence to be able to meet the requirement of the Act as the same measure of protection, there has to be a cut on the

frequency of the method in which it is done. And based simply on that, daily is the most logical provision that you could put in a 305 petition.¹⁶

Brady does not contest the evidence offered by Consol on the potential for hazardous conditions that could effect ventilation to develop in Harvey Run, or the adequacy of the existing monitoring system for detecting ventilation problems. His opinion is not based on the particulars of this mine but on his concern that coal mines in general are hazardous. He testified:

Every mine that you deal with has potentials for things happening. And in the testimony, even of Consol officials here, they believe, I am sure, as much as they believe anything, that what they have said is very accurate. And the potential here is probably very slim.

But nobody, nobody in this room, can deny that it takes any series of any events that causes a major disaster. And there are things that happen that you would never suspect, that you would never dream that would happen. But there is always one loop in there that everybody will scratch their head say I never thought of that.¹⁷

Monty Lee Christo is a staff engineer with the program operations group of the Division of Safety. The program operations group reviews petitions for modifications. Christo took no part in the review of this petition nor did he make any recommendations on it as he did not transfer to the division until after the present petition was acted upon. He agrees with the position of the division that monitoring of the checkpoints on a daily basis is necessary to achieve an equivalency with the requirements of the regulation. The reason he provided for the division's position is that the practice of MSHA is to always require daily checkpoints on §75.364(b)(2) modification petitions.

IV

The court in International Union, UMWA v. MSHA, 928 F.2d 1200 (D.C. Cir. 1991) ("SOCCO") discussed the analysis that MSHA must undertake in its application of the second inquiry of §101(c). The court held that the Assistant Secretary must make distinct findings on whether, considering all the effects of the proposed alternate method, both positive and negative, modification would achieve a net gain, or at least equivalency,

¹⁶N.T. pp. 171, 172.

¹⁷N.T. p. 181.

in overall mine safety.¹⁸ Thus, the Administrator must inquire into the net safety effect of the proposed alternate method. Here, the Administrator made no mine-specific findings. Rather, the Administrator relied on his conviction that because mining is a dangerous occupation the more examinations that are undertaken in the non-working area the safer the mine.

Consol contends that the Administrator's action here constitutes an abuse of discretion because his justification for requiring daily monitoring demonstrates that he was in fact imposing a "general requirement" on the Loveridge No. 22 Mine without engaging in formal rule-making. See Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976) and Secretary of Labor v. Carbon County Coal Company, 7 FMSHRC 1367 (Rev. Comm. 1985) where MSHA was prohibited from imposing general rules applicable to all mines in mine-specific ventilation plans. In Carbon County the court ruled:

Because we conclude that...MSHA's decision to impose the (disputed provision) was not based upon particular circumstances at the Carbon No. 1 Mine, but rather was imposed as a general rule applicable to all mines, we hold, for the reasons stated in Zeigler and enunciated here, that MSHA's insistence upon the (disputed provision) (was) not in accord with applicable Mine Act procedure.¹⁹

MSHA agrees with Consol that the Administrator must review the specific circumstances of each case when reviewing a petition for modification.²⁰

Consol is correct that the Administrator's action here was not based on conditions existing at the Loveridge No. 22 Mine. There may be instances during review of petitions for modification where MSHA can rely on a general practice to impose a safety requirement, but such is not a sufficient response here, particularly in light of the testimony presented by Consol demonstrating that its alternate standard would not result in a diminution of safety, and in light of the approval recommendations by the MSHA inspectors who personally investigated the Harvey Run area of the mine in response to the petition and the concurrence in the recommendations by the District Manager.

¹⁸International Union, UMWA v. MSHA, 928 F.2d 1200 at 1202 (D.C. Cir. 1991) ("SOCCO").

¹⁹Carbon County Coal Co. supra, p. 1375.

²⁰P. 5 of Administrator's Post-hearing Brief.

In its post-hearing brief, MSHA argues that all of the witnesses who testified in support of the Administrator's position assert that the requirement of achieving the same measure of protection was achieved by daily examinations of the aircourses in their entirety.²¹ MSHA's reading of the record is correct. However, its argument does not meet the issue. No one would disagree that daily examinations achieve equivalency. At issue is whether Consol met its burden of showing that weekly examinations achieve equivalency. MSHA also argues in its brief "...that daily examination of the monitoring stations will give the earliest possible warning that a significant disruption to the air flow in the air course has occurred." Initially, there is no evidence in the record to support MSHA's argument. If MSHA means that daily monitoring would provide earlier warning than weekly monitoring, MSHA is by definition correct. However, Consol's witnesses testified without contradiction that daily monitoring of the readings at the Harvey Run fan provides warning of a significant disruption to ventilation in the Harvey Run air courses. Moreover, earliest possible warning is not the determinative criteria. Otherwise, MSHA could demand continuous monitoring at every seal. Frank Bowers, the MSHA inspector put the argument in perspective when asked his opinion of whether weekly examinations are sufficient. He replied that he still agreed with his earlier recommendation that weekly was sufficient but that:

If you ask me if I checked it daily, is that better than weekly, I would tell you yes. I can also tell you that if you make it every hour, it is even better than daily.²² Or if you make it continuous, it is better than daily.

Again, at issue is not which frequency of monitoring, daily or weekly, imposes the earliest possible warning but whether Consol demonstrated equivalency with weekly monitoring at the check points. It is determined that Consol has met its burden of showing by a preponderance of the evidence that its alternate plan as described in its July 27, 1992 petition for modification,

as revised by the conditions set out in the Administrator's April 6, 1992 Proposed Decision and Order, excepting only that condition 2 thereof require weekly monitoring, provides safety at least equivalent to the regulatory requirement of §75.364(b)(2).

ORDER

²¹Post-hearing Brief of Administrator, p. 9.

²²N.T. p. 244.

Pursuant to Section 101(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §811(c), it is ordered that Consolidation Coal Company's Petition for Modification of the application of 30 C.F.R. §75.364(b)(2) in the Loveridge No. 22 Mine is hereby:

GRANTED, conditioned upon compliance with all provisions of the Petitioner's alternative method and the terms and conditions specified by the Administrator's April 6, 1992 Proposed Decision and Order, excepting that condition 2 thereof shall require weekly monitoring.

THOMAS M. BURKE
Administrative Law Judge

TMB:mr

